BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIXIE L. PLATT Claimant VS. **FOOD BARN, INC.** Respondent AND **ST. PAUL FIRE AND MARINE INS. CO.** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	Docket No. 157,895

ORDER

The Appeals Board considered the Kansas Workers Compensation Fund's request to review the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on May 3, 1994.

APPEARANCES

Claimant appeared by her attorney, James B. Zongker of Wichita, Kansas. Respondent appeared by its attorney, Stephen McManus of Kansas City, Kansas. St. Paul Fire and Marine Insurance Company appeared by its attorney, Daniel P. Hanson of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Cortland Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Special Administrative Law Judge found claimant entitled to permanent partial general disability benefits based upon a fifty-five percent (55%) work disability. The Workers Compensation Fund appeals the findings of the Special Administrative Law Judge and requests the Appeals Board review the following issues:

(1) Whether claimant met with personal injury by accident arising out of and in the course of her employment during the period alleged of March 1991 through August 14, 1991.

(2) If so, what is the nature and extent of disability?

(3) Whether a credit is applicable under K.S.A. 44-510a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge is modified with respect to the findings of work disability and application of credit pursuant to K.S.A. 44-510a. The Appeals Board finds claimant has sustained a work disability of forty percent (40%) and should receive benefits based upon that finding. Also, as claimant's pre-existing restrictions and limitations were factored into the determination of work disability, the credit statute, K.S.A. 44-510a, is not applicable when computing benefits.

(1) The Appeals Board finds claimant has experienced personal injury by accident arising out of and in the course of her employment with the respondent during the period of March 1991, through August 14, 1991. During this period, claimant permanently aggravated pre-existing overuse syndromes of the right arm and shoulder that have resulted in an increase of her permanent impairment of function and more restrictive limitations. As claimant's symptomatology worsened each and every day through her last day of employment on August 14, 1991, that is the day selected as the date of accident for computation of this award.

Claimant is fifty-five (55) years old and has worked for the respondent for approximately sixteen (16) years as a checker. In 1988, claimant obtained medical treatment for right carpal tunnel syndrome. After a period of conservative treatment, claimant returned to work for the respondent with restrictions. In March 1991, claimant began to experience additional symptomatology in her right upper extremity and right shoulder. Claimant reported these problems to her supervisor, but continued to work through August 14, 1991, when she ultimately left work.

Claimant began treatment with orthopedic surgeon, Duane A. Murphy, M.D., on September 4, 1991. Dr. Murphy initially diagnosed carpal tunnel syndrome on the right and possible rotator cuff irritation of the right shoulder. Dr. Murphy ultimately performed surgery on the right carpal tunnel. Dr. Murphy's office notes of May 19, 1992, contain his final diagnosis and work restrictions. In his notes, Dr. Murphy indicates claimant has ulnar tardy nerve syndrome, tendinitis of the right shoulder, and post-carpal tunnel release on the right. His notes also indicate that he believes claimant should not lift more than ten (10) pounds and avoid repetitive motion of the right elbow, hand, and shoulder. Although Dr. Murphy did not testify, his office notes were entered into evidence without objection at the deposition of his office partner, orthopedic surgeon Robert L. Eyster, M.D.

Claimant was also evaluated by Wichita physician Ernest R. Schlachter, M.D., who previously evaluated claimant on January 3, 1989, for the injuries she had sustained in

1988. For claimant's present injury, Dr. Schlachter saw and evaluated claimant on two dates, September 17, 1992 and March 18, 1993. In his 1989 evaluation, Dr. Schlachter found claimant was experiencing overuse syndrome of the right arm, neck, and shoulder girdle which constituted a ten percent (10%) permanent partial impairment of function to the body as a whole. In 1989, Dr. Schlachter placed restrictions upon claimant of no repetitive pushing, pulling, twisting, or grasping with the right arm, and no lifting greater than twenty (20) pounds with the right arm. In his 1992 evaluation, Dr. Schlachter found claimant had aggravated the pre-existing overuse syndrome of the right arm and shoulder and noted claimant had been operated on for carpal tunnel syndrome on the right hand. The doctor also noted that claimant was developing overuse syndrome of the left arm, but it was relatively asymptomatic at that time. As a result of the 1992 evaluation, Dr. Schlachter believed that claimant had experienced a fourteen percent (14%) permanent partial impairment of function to the body as a whole due to the injuries to the right upper extremity and right shoulder. Dr. Schlachter's evaluation in March 1993, indicated claimant's overuse syndrome had worsened and claimant was in need of more restrictive limitations. In 1993, Dr. Schlachter's diagnosis was aggravation of pre-existing overuse of the right arm and shoulder girdle with rotator cuff tendinitis and right carpal tunnel syndrome previously operated. Also, Dr. Schlachter believed claimant's overuse of the left upper extremity was gradually becoming more symptomatic in spite of her inactivity. As a result of the most recent evaluation, Dr. Schlachter rated claimant as having a ten percent (10%) permanent partial impairment of function to the body for the right shoulder, fifteen percent (15%) impairment to the right upper extremity, and five percent (5%) impairment to the left upper extremity, all of which combine to a twenty percent (20%) permanent partial impairment of function to the body as a whole.

The other physician to testify in this proceeding was orthopedic surgeon Robert L. Eyster, M.D., who treated claimant for two months in 1988 for right carpal tunnel syndrome. Although Dr. Murphy treated claimant in 1991 and 1992 for her present injuries, the insurance carrier asked Dr. Eyster to evaluate claimant for purposes of this proceeding. Dr. Eyster saw claimant in July 1992 and diagnosed post-carpal tunnel release. Dr. Eyster testified that he does not believe claimant has experienced additional impairment as a result of her alleged injuries in 1991, nor needs more restrictive limitations than those appropriate when he last saw her in June 1988. Although Dr. Eyster admits the MRI taken of claimant's shoulder indicates claimant most likely has tendinitis or degenerative changes in the shoulder and although he respects Dr. Murphy's diagnostic capabilities and recognizes Dr. Murphy diagnosed tendinitis of the right shoulder as late as May 1992, he disagrees with Dr. Murphy's opinion regarding claimant's restrictions and shoulder condition. Despite claimant's complaints of increased symptomatology, the carpal tunnel release surgery performed by Dr. Murphy, and the findings of the MRI report, Dr. Eyster believes claimant's condition is the same now as in 1988.

Based upon the testimony of claimant, along with the medical evidence presented, the Appeals Board finds it is more probably true than not that claimant experienced permanent aggravation to her right hand, arm, and shoulder as a result of her work activities during the period of March 1991, through August 14, 1991, for which she is entitled benefits under the Workers Compensation Act. The Kansas Supreme Court has ruled that it is not necessary for the injury to be caused by trauma or some form of physical force to be compensable. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978). Personal injury may result from an accident which can occur in a single event or in a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing his or her usual tasks in their usual manner, the employee suffers an injury. Downes v. IBP, Inc., 10 Kan. App. 2d 39, 41, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985). It is well settled in this state that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the infliction. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

Demars v. Rickel Manufacturing Corporation, *supra*; Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

(2) Claimant has sustained a forty percent (40%) work disability as a result of her compensable work injury.

Claimant's right to permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e, which reads in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

Mr. Jerry D. Hardin was the only labor market expert to testify. Although pre-existing restrictions and limitations may not be appropriate to consider in all instances, Mr. Hardin considered them in this proceeding. Mr. Hardin testified that claimant lost thirty to thirty-five percent (30-35%) of her ability to perform work in the open labor market based upon the pre-injury and post-injury restrictions of Ernest R. Schlachter, M.D. Also, Mr. Hardin testified claimant has lost forty-seven percent (47%) of her ability to earn a comparable wage. Although Mr. Hardin testified claimant has a sixty-five to seventy percent (65-70%) loss of labor market using the restrictions of Dr. Eyster pre-injury and the restrictions of Doctors Murphy and Schlachter post-injury, the Appeals Board gives little weight to that opinion because, in this instance, it believes a better measure of loss is obtained using the restrictions of the same physician for post- and pre-injury analysis. Therefore, when considering the thirty to thirty-five percent (30-35%) loss of ability to perform work in the open labor market and the forty-seven percent (47%) loss of ability to earn a comparable wage, the Appeals Board finds claimant has experienced a forty percent (40%) work disability. Although the Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage, in this case there appears to be no compelling reason to give either factor a greater weight and, accordingly, they are weighed equally.

(3) Although claimant received an award of workers compensation benefits for her accidental injury sustained in 1988 while working for the respondent, her present award should not be reduced by K.S.A. 44-510a. K.S.A. 44-510a(a)(Ensley), often referred to as the credit statute, provides, in part:

> "If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workmen's compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability."

The purpose of the statute is to prevent the receipt of duplication of benefits. Under the statute, when a prior disability contributes to the ultimate disability following a later injury, the amount paid to the injured employee for the later injury is reduced by the

percentage of contribution. In the present proceeding, claimant's pre-existing restrictions were considered by the labor market expert to determine the losses of labor market and ability to earn a comparable wage. By factoring in the pre-existing restrictions in such manner, the labor market expert identified the loss that was directly attributable to the present injury and, thus, avoided inclusion of any loss attributable to the prior injury. Therefore, the manner of the analysis of the labor market expert has eliminated any contribution between the prior injury and present disability. Because there is no contribution, there is no reduction of compensation or credit.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on May 3, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dixie L. Platt, and against the respondent, Food Barn, Inc., its insurance carrier, St. Paul Fire and Marine Insurance Company and the Kansas Workers Compensation Fund for an accidental injury which occurred on August 14, 1991, and based upon an average weekly wage of $360.00, for 58 weeks of temporary total disability compensation at the rate of $240.01 per week or $13,920.58, followed by 357 weeks at the rate of $96.00 per week or $34,272.00 for a 40% permanent partial general body disability, making a total award of $48,192.58.

As of February 24, 1995, there is due and owing claimant 58 weeks of temporary total disability compensation at the rate of $240.01 per week or $13,920.58, followed by 126.43 weeks of permanent partial disability compensation at the rate of $96.00 per week in the sum of $12,137.28, for a total of $26,057.86 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $22,134.72 is to be paid for 230.57 weeks at the rate of $96.00 per week, until fully paid or further order of the Director.

Unauthorized medical expense of up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Future medical benefits will be awarded only upon proper application to and approval of the director.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 25% to the respondent and 75% to the Kansas Workers Compensation Fund to be paid directly as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Ireland & Barber	
Transcript of Preliminary Hearing	$158.50
Transcript of Preliminary Hearing	$ 98.40
Barber & Associates	
Transcript of Preliminary Hearing	$ 95.40

Transcript of Regular Hearing	$367.20
Deposition of Ernest R. Schlachter, M.D.	$197.75
Deposition of Jerry D. Hardin	$278.00
Deposition Services	
Transcript of Preliminary Hearing	$146.65
Court Reporting Services	
Deposition of Robert L. Eyster, M.D.	$203.70

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The labor market expert testified that claimant has a sixty-five to seventy percent (65-70%) loss of ability to perform work in the open labor market considering the pre-injury restrictions of Dr. Eyster and the post-injury restrictions of Doctors Murphy and Schlachter. The Appeals Board has given no weight to this opinion. Although in numerous other cases the Appeals Board has averaged the opinions of opposing labor market experts, or the opinions of one expert when that person has considered the restrictions of different physicians, the Appeals Board is deviating from that practice without justification. Although consistency for the mere sake of consistency is not imperative, the established method of analysis of work disability often urged by the majority should not be disregarded merely because it yields higher permanent partial general disability. Claimant is a fifty-five (55) year old grocery store clerk who can no longer perform her occupation of twenty-five (25) years, and is now severely restricted in her employment opportunities. The sixty-five to seventy percent (65-70%) loss of labor market is closer to claimant's actual loss as a result of these injuries and should, at the very least, be given equal weight.

BOARD MEMBER

cc: James Zongker, Wichita, KS
Stephen McManus, Kansas City, KS
Daniel P. Hanson, Overland Park, KS
Cortland Q. Clotfelter, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director